CMC Electrical Construction and Maintenance, Inc. *and* Local 363, International Brotherhood of Electrical Workers, AFL-CIO. Case 2-CA-35489

May 31, 2006

ORDER REMANDING PROCEEDINGS

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

On April 5, 2004, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

In its exceptions, the Respondent asserts that the judge demonstrated bias in favor of the Charging Party and, thus, denied the Respondent due process. The Respondent contends that the judge "practically advocates the position of the General Counsel without regard to the voice of the evidence."[1] The Respondent requests that the Board decline to adopt the judge's decision, or alternatively, that it conduct a hearing de novo before the Board.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Consistent with our decision in *Dish Network Service Corp.*, 345 NLRB No. 83 (2005), we have decided to remand this case to another judge in order for him or her to review the record and issue an appropriate decision.

In this case and in many others, the same judge has copied extensively from the General Counsel's brief in his decision. In each case, the judge then decided the case in favor of the General Counsel.[2] In this proceeding, nearly all of the statement of facts and legal analysis in the judge's decision were copied almost verbatim from the General Counsel's brief.

In *Dish Network*, supra, we said: "[I]t is essential not only to avoid actual partiality and prejudgment . . . in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal." 345 NLRB No. 83, slip op. at 1 (citing *Indianapolis Glove Co.*, 88 NLRB 986 (1950)). See *Reading Anthracite Co.*, 273 NLRB 1502 (1985); *Dayton Power & Light Co.*, 267 NLRB 202 (1983).

Considering the instant case in the context of all of these cases as a whole, the impression given is that Judge Edelman simply adopted, by rote, the views of the General Counsel and failed to conduct an independent analysis of the case's underlying facts and legal issues.

We recognize that the Respondent did not specifically except to the judge's extensive copying.[3] However, that fact does not, and should not, preclude the Board from taking corrective measures. It is the Board's solemn obligation to insure that its decisions and those of its judges are free from partiality and the appearance of partiality. The cited decisions of Judge Edelman fail to meet this elemental test.

We understand that this remand delays the issuance of a Board decision, and this may inconvenience the parties. However, we believe that the fundamental necessity to insure the Board's integrity outweighs these considerations.

In order to dispel this impression of partiality, we will remand the case to the chief administrative law judge for reassignment to a different administrative law judge. This judge shall review the record and issue a reasoned decision.[4] We will not order a hearing de novo because

[1] Specifically, the Respondent argues that the judge uniformly credited the General Counsel's witnesses, even crediting union business agent Sam Fratto, who did not testify. The Respondent asserts that, in contrast, its witnesses were consistently discredited, except for statements against the Respondent's interests. In addition, the Respondent contends that the judge failed to refer to certain documentary evidence that it submitted, and precluded the Respondent from pursuing certain questioning. In his answering brief, the General Counsel argues that the judge conducted the hearing in an impartial manner and that the crediting of Fratto, whose name was mentioned numerous times throughout the hearing, was merely an oversight.

[2] See *Trim Corp. of America*, 347 NLRB No. 24 (2006); *Crossing Rehabilitation*, 347 NLRB No. 21 (2006); *Regency House of Wallingford*, 347 NLRB No. 15 (2006); *Simon DeBartelo Group*, 347 NLRB No. 26 (2006); *Eugene Iovine, Inc.*, 347 NLRB No. 23 (2006); *J. J. Cassone Bakery*, 345 NLRB No. 111 (2005); *Dish Network*, supra; *Fairfield Tower Condominium Assn.*, 343 NLRB No. 101 (2004).

[3] Member Liebman reluctantly concurs in her colleagues' decision to remand the case to another judge. In doing so, she observes that the Respondent's exceptions did allege bias on the judge's part, which she views as sufficient to raise the issue of whether the judge's copying warrants a remand. Compare, *Regency House of Wallingford*, supra, 347 NLRB No. 15 (Member Liebman dissenting)(failure to except to judge's copying or even generally to allege bias on judge's part should preclude Board from remanding case on that basis).

[4] The new judge may rely on Judge Edelman's demeanor-based credibility determinations unless they are inconsistent with the weight of the evidence. If inconsistent with the weight of the evidence, the new judge may seek to resolve such conflicts by considering "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole." *RC Aluminum Industries*, 343 NLRB No. 103, slip op. at 1 fn. 2 (2004), quoting *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (internal quotation marks and citations omitted). Alternatively, the new judge may, in his/her discretion, reconvene the hearing and recall witnesses for further testimony. In doing so, the new judge will have the authority to make his/her own demeanor-based credibility findings.

our review of the record satisfies us that Judge Edelman conducted the hearing itself properly.

ORDER

It is ordered that the administrative law judge's decision of April 5, 2004, is set aside.

IT IS FURTHER ORDERED that this case is remanded to the chief administrative law judge for reassignment to a different administrative law judge who shall review the record of this matter and prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on the evidence received. Following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

Dated, Washington, D.C. May 31, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Judith M. Anderson, Esq., for the General Counsel.
Paul O'Sullivan, Esq. (Corbally, Gartland & Rappleyea, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried on February 9, 2004, in New York, New York.

Based upon the charges filed by Local 363, International Brotherhood of Electrical Workers (the Union) against CMC Electrical Construction and Maintenance, Inc. (CMC or Respondent), a complaint issued on August 22, 2003, alleging various of Section 8(a)(1) and (3) of the Act.

Based upon the entire record in this case, including my observation of the demeanor of the witnesses, and briefs filed by counsel for the General Counsel, and counsel for Respondent, I make the following

FINDINGS OF FACT

Respondent is a New York corporation with an office and place of business in Wallkill, New York, engaged in the business of providing electrical services on commercial construction projects throughout the Hudson Valley, including Rockland and Orange Counties, in the State of New York. Annually, Respondent in conducting its business operations, provide services valued in excess of $50,000 to enterprises located within the State of New York, each of which is directly engaged in interstate commerce.

It is admitted, and I conclude Respondent is engaged in the interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent is a nonunion electrical contracting company owned by Michael Coleman, and employing primarily electricians and apprentice/helpers at various construction sites throughout the Lower Hudson Valley, New York, including a strip mall consisting of six stores including a Marshall's Department Store as the anchor store located in Newburgh and a bar/restaurant located in New Paltz.

In October 2002, Coleman rehired master electrician Mike Browne to work for him. Browne had previously worked for Coleman for about 1-1/2 years during the 1999–2000 period. Browne was hired as a permanent, full-time electrician working 8 hours a day, 5 days a week.

Because of his past work experience with CMC, Coleman had confidence in Browne's ability and they had a friendly relationship. Coleman moved Browne from site to site depending on where a more experienced electrician was needed. Browne might be at a site for 3 days or for weeks. Coleman called Browne to inform him if there was to be a change in his worksite and at other times Browne might call Coleman to find out where Coleman wanted him to work. [1]

In February 2003, Assistant Business Agent Sam Fratto of Local 363 made an initial visit to the Marshall's jobsite and established Browne as a conduit for the Union to organize CMC. Browne credibly testified that he was in the Marshall's

[1] I credit the testimony of Browne. I was impressed with his demeanor. Moreover, his testimony was detailed and he was responsive to questions put to him on direct and cross-examination. Further his direct testimony was consistent with cross-examination.

I credit the testimony of Sam Fratto, business agent for the Union. I was impressed with his demeanor. Moreover, his testimony was not rebutted by Respondent's witnesses.

I credit the testimony of employee John Dickson. I was impressed with his demeanor. His testimony was detailed. He was responsive to questions put to him on both cross- and direct examination. Moreover, his direct testimony was consistent with cross-examination.

I credit the testimony of union organizer, John Sager, for the same reasons as Browne and Dickson. Moreover, Sager freely made an admission against interest when he testified in a conversation with Coleman concerning placing union literature on cars parked in a parking lot at a Respondent jobsite, that if he knew which car was Coleman's, he "probably would have shit on it."

I also credit the testimony of Frank Sylvester for essentially the same reasons as Browne and Dickson.

I credit the testimony of employees Dan Lee and Timothy Losce, witnesses called by Respondent, especially concerning their admissions that Coleman told the employees on May 30, at the Marshall jobsite that they could leave early that day, and Lee's testimony that Coleman was generally lax about employees arriving late to jobsites, and leaving early.

I do not credit the testimony of Michael Coleman, except where he testified admissions against his interest. In this regard, I was unimpressed with his demeanor. He was vague, and evasive during cross-examination.

department store electrical room with Foreman Mitch Bernasconi, when Fratto walked in and introduced himself. Bernasconi immediately left the room. Fratto began talking to Browne, asking him what he was doing on the job and if he knew how Coleman felt about the Union. Browne responded that he wasn't sure but he didn't think Coleman wanted to go Union. At that point, Browne saw Coleman peek his head around the corner of the electrical room, looked at Browne and Fratto, and then leave the area. Fratto and Browne finished their conversation and Fratto left. After Fratto left, Coleman came over to Browne and asked him what Fratto had to say. Browne told Coleman that Fratto had wanted to know if Coleman wanted to go Union or not. Coleman then stated, "Well, I don't want you to leave. You know, there's a possibility that I could go union or—and have a non-union shop."

Browne credibly testified that after Fratto's visit, he began talking with other employees in conversations about the Union and voicing his support for the Union. On one specific occasion in March, Browne was in the job trailer with Bernasconi and other workers when one of the men said that anybody who was in the Union would lose their house. Browne spoke up for the Union and said that it wasn't true as he knew plenty of guys that have houses and work for the Union.

Electrician John Dickson testified that on the morning of March 12 he went into the Marshall's Department store and asked some men working in the area if there were any electricians around. Bernasconi, a foreman was in the area and said he was an electrician. Dickson asked if CMC was hiring and Bernasconi told him the owner would be in at about 9 a.m. and for Dickson to come back then. When Dickson came back at 9 a.m. he was taken to the job trailer and introduced to Coleman. Coleman handed him an application and asked what job experience he had. Dickson told Coleman that he had worked for a contractor in Newburgh for 10 years, worked out in Ohio for about 5 years, and worked for another contractor for 3 years. Dickson filled out the application and gave it back to Coleman. Coleman looked over the application and said that he didn't have any work right then, to call back on the following Monday or Tuesday. Dickson went home and about 1-1/2 hours later he received a call from Coleman asking him to report to work that day. Although Dickson had been a member of Local 363 for 21 years, he did not volunteer this information to Coleman and for the next 3-1/2 weeks avoided answering Coleman's numerous questions about his union activities.

Dickson credibly testified that the first occasion he recalled Coleman questioning him about his union membership was on March 21. Dickson was in the middle of Marshall's Department Store when Coleman approached him and asked if Sam Fratto had sent Dickson to CMC and whether he was a member of the Union. Dickson replied that he didn't know what Coleman was talking about. Coleman said he "didn't care if Dickson was a Union member or not. He just wanted to know." Dickson again told him he didn't know what Coleman was talking about. Coleman then walked away.

On March 31, Dickson credibly testified that he was working at the strip mall next to Marshall's Department Store when Coleman said to him that Sam Fratto had been there Friday morning and said that Dickson was a union member. Dickson again said he didn't know what Coleman was talking about. Coleman persisted and tried to get Dickson to talk about the Union by telling Dickson that he didn't care if Dickson was a union member or not, that he just wanted to know. Dickson continued to evade the question.

About the second week in April, the Union's presence became even more visible, when Union Organizer John Sager began handbilling at the Marshall's jobsite and put Coleman on notice that he was going to begin organizing CMC on a daily basis. Sager credibly testified that about the second week in April, he went to the Marshall's jobsite and talked to Coleman and Foreman Bernasconi. After Coleman introduced himself, Sager said, "[O]h, then you probably recognize my name." Coleman said that he did. Coleman said that his grandfather owned Coleman McInerney and that he, himself, was a former member of Local 215. Sager replied, "Jeez, being that you're [sic] family came from a Union background, why can't the two of us work together and unionize your company and you can have the benefits of being a union contractor?" Coleman replied that he was very unhappy with the Union because of the way they treated him and was unhappy that Sager and Local 363 Assistant Business Manager Sam Fratto had stopped on his job site and were talking to his men. Coleman continued, stating that if Fratto and Sager persisted in trying to organize his company, that he was going to cause problems and go after Local 363. When Sager asked Coleman what he meant, Coleman replied that if the Union caused him problems, he would cause them problems. Sager told him the problem that he was going to have now was that he was going to protest the fact that Coleman paid a substandard wage to his employees. Sager went on to tell Coleman that he would continue to stop on his jobsites, talk to his employees, and organize him on a daily basis. Sager then got in his car and left the site.

Within a week of Sager declaring to Coleman that he was going to organize his workers, journeyman electrician Frank M. Sylvester Jr. went to the Marshall's site looking for work. Sylvester, a journeyman electrician and member of Local 363 since about 1980, credibly testified that on or about April 21 he went to the Marshall's site to look for work. He was directed to the job trailer. Coleman and Bernasconi were in the trailer. Sylvester credibly testified Coleman asked him what he wanted. Sylvester said, "I was wondering if you were hiring." Coleman said, "How do you know about me?" Sylvester replied, "Well, I'm just an out of work electrician, and it's a construction site, so I figured maybe you would be hiring." Coleman then asked Sylvester, "Are you with the Union?" Sylvester admitted that he was a member of the Union. Coleman then said, "I don't want to have nothing to do with the fucking unions." Sylvester said, "Well, if you want a good electrician, call Ray Kellogg. He's your brother-in-law." Coleman said, "I'm not fucking calling anybody. I don't—nothing personal. I don't want to have nothing to do with the unions." Sylvester then left. Coleman did not give Sylvester an application, did not take his name or phone number, and did not ask for a resume. At no time thereafter did Coleman call Sylvester about a job. Coleman admitted that since Sylvester applied for work on April 21, Respondent hired the following journeymen electricians: July 31, 2003, Robert Carter; July 15, 2003, Christian P.

Ceasarine; and August 6, 2003, Michael F. Sharpe and that he did not call Sylvester prior to the hiring of any of the three. Although Coleman testified that all three are journeymen electricians, Respondent failed to present any evidence to show that they possessed qualifications which were superior to Sylvester's almost 25 years of experience.

On May 1, Sager filed an unfair labor practice charge against Respondent. He also prepared a blue handbill with a "Notice to the Public" on one side and a copy of the charge on the back. That same day, he put the handbill on cars at CMC's Dooley Square jobsite in Poughkeepsie and on cars parked in the dirt parking lot at the Marshall's jobsite.

Within less than a week, Sager credibly testified he was back at the Marshall's site putting handbills under the windshields and in the cars parked in the dirt parking lot at the Marshall's jobsite. After handbilling the cars, Sager went over to the grass divider at the entrance to the mall and handbilled the cars as they went in and out of the site. Sager had handbilled for about 15–20 minutes when Browne came over to say "hello" and ask what he was doing. At just about the same time, Coleman came running up waving a blue handbill and yelling, "I told you I didn't want you coming to my jobs. I told you I didn't want you talking to my guys. I don't want you putting this handbill on my truck." In response to Coleman's outburst, Sager told him he didn't know which truck was his but if he had, he "probably would have shit on it." Coleman continued to yell at Sager, Sager told him to "get the fuck away."

Sager credibly testified that he continued handbilling and about 15 minutes later, three or four police cruisers pulled into the site just beyond where he was standing. As Sager continued to handbill, he saw the police talking to Coleman. After about 15 minutes, one of the cruisers parked near Sager. Two police officers got out and one of them told Sager not to put handbills on the cars in the parking lot, but that it was all right to continue to handbill cars as they came in and out of the site. Sager testified that when he asked the officer if that was all he was there for, the officer pointed at Coleman and said Coleman said that Sager had threatened him. Sager denied threatening Coleman. Coleman admitted that he had called the police.

Browne credibly testified that on numerous occasions in March, April, and May he talked to Union Organizer Sager as Sager was standing on the divider leading into the jobsite handbilling the public and employees as they drove into the mall area. One such occasion was the May 14 incident between Sager and Coleman regarding Sager's putting a handbill in Coleman's truck.

On May 29, Browne worked at the Rosendale Recreation Center jobsite. At some time during that day, he received a telephone call from Coleman telling him to report to the Marshall's jobsite the following day. When Browne arrived at the Marshall's jobsite on Friday, May 30, there were about six men just standing around because neither Coleman nor Bernasconi were present to tell them what to do. Browne then made a call from his cell phone to Coleman's house, and told him that there were two men from another company at the site and what did he want him to tell them. Coleman said, "Keep the guys there all day, and if you see any of the general contractors tell them that me and Mitch are in Florida."

Shortly thereafter, employees Dan Lee arrived at about 9 a.m., Browne told Lee to call Coleman because he couldn't get through to Coleman. Around 9:39 a.m., Lee called and talked to Coleman. Lee then went over to the men and stated, "Mike said that the checks were coming but they were going to be no good, and whoever wanted to leave the job site, could leave the job site." Browne chose to go ahead and leave the site but before leaving tried to call Coleman from his cell phone to let Coleman know that he was leaving the jobsite and to arrange to get his check around 3:30 p.m. Browne was unable to talk to Coleman and left a voice message on Coleman's home phone. After Browne left the jobsite, he tried to use his cell phone to call Coleman but by now his cell phone service had been terminated. Browne then went home and waited for Coleman's call. When Coleman failed to call by 3:30 p.m., Browne called Coleman and Bernasconi but there was no answer.

About 9:30 p.m., Browne went to a local bar located next door to where Bernasconi lived. At the bar, Browne ran into Bernasconi's brother, Keith who went to Bernasconi's apartment and got Browne's check for him.

On the morning of May 31, Browne went to the bank to cash his CMC check and was told there were no funds in the account. When Browne called Coleman to tell him, Coleman said that funds had been put in the CMC account and Browne should be able to cash the check that afternoon.

Browne further credibly testified that on June 2, he called Coleman at about 6:30 a.m. and asked him what was going on with work. Browne testified that Coleman got very angry and said that the Union was "busting his balls" and that he was going to have to go to Federal court. When Browne denied having anything to do with that, Coleman said that he did because he went behind his back and talked to the guys about the Union. Coleman then told Browne that he, Browne, had refused to quit the Union when he had asked him to earlier. Browne agreed that he had refused to quit the Union before, when Coleman had asked him, because he had too much invested in it. Browne then told Coleman, "I'm not going to quit the Union." At that point, Coleman said to Browne, "Well, you have to make up your mind what you're going to do." At this point the conservation ended.

Later that same day, Browne again went to the bank to try to cash his payroll check. This time the bank cashed the check but told Browne that his payroll check for the previous week had bounced.

Browne also testified that on June 3, he called Coleman at his house and told Coleman that his check from the week before had bounced. Coleman said he was unaware that this was going to happen and that he would get back to Browne as soon as possible.

Browne made at least two more attempts to talk to Coleman on June 4. On June 5, when Coleman had still not called, Browne took a copy of his bounced check to the Marshall's jobsite and gave it to Bernasconi and said, "[L]isten, tell Mike he'd better get in touch with me, or I'm going to go to the Labor Board." Browne then got in his car and drove off. By the time Browne arrived at home, Coleman had left a message on his answering machine. Coleman's message stated that Coleman would have Browne's check and would meet him at P &

G's, a local bar in New Paltz. Coleman arrived at the bar and gave Browne his check and started talking about the Union. Coleman told Browne that he was not going to go Union. Browne said he was fine with that and they parted.

On Friday, June 6, Browne credibly testified that he again called Coleman to see about picking up another check still due him. Coleman told Browne he could pick it up later that day. Browne then asked Coleman about work and Coleman said when he met Browne with the check, he would discuss work with him at that time. When they met later that day, Coleman gave Browne his check and said that he would call Browne later and let him know about work.

Browne credibly testified that he called Coleman several times after May 31 asking him when and where he was to report to work and left numerous voice messages on Coleman's answering machine. Neither Coleman nor anyone else from CMC ever told Browne he could report to work.

Sager credibly testified that he continued his efforts to organize Respondent and did not confine his efforts to the Marshall's and Dooley jobsites. On or about June 19, as he was driving by a bar and tavern under construction in New Paltz, he saw two men on extension ladders on the outside of the building installing lighting fixtures. Sager recognized the larger of the two men, probably Bernasconi, the foreman, as working for CMC at the Marshall's jobsite so he stopped to talk to them. Sager introduced himself and the larger man told Sager he was wasting his time because they didn't want a union. As Sager told them he was only trying to help them make a decent living, the two men began to walk away. As the men walked into the entrance, the larger man turned around and told Sager, "I told you I did not want you on my job." Sager again told them he was only trying to help them make a decent living, the larger man said if Sager didn't leave he was going to call Coleman. At about the same time, the smaller man was standing in the doorway talking on a cell phone. The smaller man said to Sager, "Mike Coleman wants to talk to you." Sager asked that they give him Coleman's cell phone number and he could call Coleman. Sager then went out to his car and called Coleman. Coleman told Sager that he didn't want him talking to his guys and they were not allowed to talk to him. Coleman then hung up on Sager. Sager then walked back to the jobsite and the larger man said to him, "I called Mike Coleman, and Mike Coleman says he has a restraining order against you, so you better leave." Sager denied any knowledge of a restraining order and said it was a public sidewalk and he was not leaving. Sager then went back and got his camera to take photos of the site. As he was getting his camera set up and taking pictures, two New Paltz police officers came up to him on bicycles. One officer said they had received a complaint, undoubtedly from Coleman. Sager explained that he was with the Union and was organizing CMC. One of the officer's then said that he heard there was a restraining order against Sager and did Sager know anything about it. Sager denied any knowledge of a restraining order. The officers took Sager's business card and driver's license and walked into the building and talked to the two CMC workers. About 15 minutes later, the two officers came out and said, "The big guy says he's the foreman for this job, that he's an agent of CMC Electric, and he does not want you on this job." The officer told Sager he did not want him going in to the building. The officers then gave Sager back his driver's license and got on their police radio and called the building inspector.

Analysis and Conclusions

In order to establish a prima facie violation of Section 8(a)(3), it must be shown that the employee was engaged in union activity, that the employer had knowledge of such activity, that the employer exhibited animus or hostility toward the activity, and that the employee's protected activity was a "motivating factor" in the employer's decision to take adverse action against the employee. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983).

A. The Discharge of Browne

It is undisputed that Respondent had knowledge of Browne's membership in IBEW Local 208 and his support of IBEW Local 363. The evidence clearly establishes Respondent's owner Michael Coleman exhibited numerous acts of animus toward the Union through, inter alia, persistent questioning of employees about their union membership, unreasonable out bursts toward Local 363 organizer John Sager when Sager was handbilling Respondent's sites, summoning police in an effort to stop Sager from handbilling, refusing to consider Frank M. Sylvester for a job because of his membership in the Union, and his insistence that Browne quit his membership in the Union in order to keep his job.

Browne credibly testified that on numerous occasions after Local 363 began its organizing efforts at the Marshall's jobsite, Coleman told Browne that he did not want to have a union company and that he wanted Browne to quit the Union. Browne continually rejected Coleman's requests. On June 2, when Browne called Coleman and asked what was going on with work, Coleman got very angry and said the Union was "busting his balls" and that he was going to go to Federal court. Coleman then accused Browne of talking to the other workers about the Union and brought up the fact that Browne had refused Coleman's earlier request that Browne quit the Union. Browne further testified that he again told Coleman, "I'm not going to quit the Union." At which point, Coleman said, "Well, you have to make up your mind what you're going to do." Thereafter, Coleman continued to ignore Browne's calls and requests to return to work.

Coleman's testimony on direct examination corroborates Browne assertion that Coleman had asked him to quit the Union in order to keep his job. In his testimony, Coleman admitted that he talked to Browne on June 2 about how they might be able to "work out Browne's employment" and that he wanted Browne to continue to work for him. Coleman further admitted that Browne was "concerned that there would be retributions from the Union and I guess he chose the Union over CMC." When asked by Respondent's counsel whether Browne stated his concerns, Coleman testified, "[h]e thought that, perhaps, that he'd lose his pension. And, that—basically, that was the largest sticking point." Coleman testified that at the last meeting he had with Browne a few days later, Browne said, "So, do you want me to come back to work?" Coleman's only reply

was, "Mike, think about what you want to do, and give me a call Monday." Although Coleman was not clear on the exact date of this conversation, it is clear from Browne's testimony that he made numerous calls to Coleman to find out when to report to work. I conclude that Coleman's admission that he would not allow Browne to come back to work until Browne gave up his membership in the Union clearly establishes Browne's refusal to do so was a motivating factor in Respondent's refusal to assign Browne work.

I conclude that Respondent's continued refusal to answer Browne's telephone calls and to give Browne a date to go back to work was conduct which could have reasonably lead Browne to believe that he had been discharged. "The test for determining whether [an employer's] statements constitute an unlawful discharge depends on whether they would reasonably lead the employees to believe that they had been discharged." *Ridgeway Trucking Co.*, 243 NLRB 1048 (1979), enfd. 622 F.2d 1222 (5th Cir. 1980) (quotations and citation omitted). The Board has held that the "fact of discharge does not depend on the use of formal words of firing. . . . It is sufficient if the words or action of the employer would logically lead a prudent person to believe his [her[tenure has been terminated." *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964).

I conclude that the evidence adduced by counsel for the General Counsel establishes that Respondent had knowledge of Browne's membership in, and activities on behalf of the Union. I also conclude that Coleman's intense union animus is conclusively established by his unlawful interrogation, his summoning of the police to thwart the Union's organizational activities, his threats to Browne and his clear expressions of intense union animosity, described above and below. Further, the timing of the discharge, at the very peak of the Union's organizational campaign is strong evidence of an unlawful discharge. Accordingly, I conclude counsel for the General Counsel has established a strong prima facie case.

Once the General Counsel has established a prima facie case, the burden shifts to the Respondent to show that the same action would have taken place even in the absence of protected conduct. *Wright Line*, supra. This burden cannot be satisfied by a mere statement or demonstration of a legitimate reason for the action taken. Rather, Respondent must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T & J Trucking Co.*, 316 NLRB 771 (1995). Where the employer's *Wright Line* defense is not supported by the record, it is considered a mere pretext. *Electromedics, Inc.*, 299 NLRB 928 (1990). Even where the employer's rationale is not patently contrived, the Board has held that the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." *General Films*, 307 NLRB 465, 468 (1992).

I conclude that Respondent failed to meet its burden to show that it would have taken the same action even in the absence of protected conduct. In his testimony on direct, Coleman tried to infer that Browne's leaving the Marshall's jobsite early on May 30 supported his theory that Browne had quit his job. However, Respondent's witnesses Donald Lee and Timothy Losee corroborated Browne's testimony that the employees were told they could leave early that day. Lee's testimony completely discounted Browne's absence from work as having any significance. Lee credibly testified that Coleman was very lax about people coming and going to work and that he had seen it happen ten times like that on the jobsites. Lee testified that certain guys might want to go home for different reasons and nobody paid attention to it. He said it was their option of going home or staying.

Respondent then introduced into evidence payroll sheets for March 3 through June 1. Respondent argued that the records would show that during the last 2 months, Browne had worked fewer than 40 hours a week so he, therefore, must have been thinking about quitting. I find this argument and the documents are not probative and are totally without merit. Even assuming arguendo that they should be considered, Browne testified that he was out during that time period due in part to taking his wife to the fertility clinic. In his own testimony, Coleman admitted that he was aware that Browne took time off for the fertility clinic and that he had approved the time off, and Browne had not been disciplined for it. In fact, Respondent's witness Lee credibly testified that Coleman was very lenient when it came to giving employees personal time and that he knew of a number of times that people would work until noon time and then say, "It's hot. I don't want to work today" and leave. Lee also testified that Coleman would let the people that were working for him take off at any time they wanted and there were a lot of people that could come and go.

Accordingly, I conclude Respondent has utterly failed to establish its *Wright Line* burden and therefore conclude that Browne was unlawfully discharged in violation of Section 8(a)(1) and (3) of the Act.

B. The Refusal to Hire Sylvester

The credible testimony of Frank Sylvester establishes that on April 21, Sylvester, a journeyman electrician and member of Local 363 since 1980, went to the Marshall's site and talked to Coleman about a possible job. When he arrived, Coleman and Bernasconi were in the CMC job trailer. Sylvester said, "I was wondering if you were hiring." Coleman said, "How do you know about me?" Sylvester replied, "Well, I'm just an out of work electrician, and it's a construction site, so I figured maybe you would be hiring," Coleman then asked Sylvester, "Are you with the Union?" Sylvester admitted that he was a member of the Union. Coleman then said, "I don't want to have nothing to do with the fucking unions." Sylvester said, "Well, if you want a good electrician, call Ray Kellogg. He's your brother-in-law." Coleman said, "I'm not fucking calling anybody. I don't—nothing personal. I don't want to have nothing to do with the unions." Sylvester then left. Coleman did not give Sylvester an application, did not take his name or phone number, and did not ask for a resume. Coleman admits that at no time thereafter did he call Sylvester about a job. Coleman's contention that he asked Sylvester about whether he was with the Union, only after he told Sylvester there was no job available would still be violative because it was said in the context of the application process and would lead Sylvester to believe that he would not be considered within the pool of potential

applicants. Coleman testified that he never called Sylvester after that day.

Coleman admitted that since Sylvester applied for work on April 21, Respondent hired the following journeymen electricians: July 31, 2003, Robert Carter; July 15, 2003, Christian P. Ceasarine; and August 6, 2003, Michael F. Sharpe, and that he did not call Sylvester prior to the hiring of any of the three. The General Counsel questioned Coleman as to what qualifications he considered when hiring Carter, Ceasarine, and Sharpe. Coleman testified that Carter had been referred to him by another contractor who said Carter was a "good Journeyman wireman" and that word of mouth was good enough for Coleman. Coleman further testified that Ceasarine had been recommended by his employee Charlie Williams. Williams told Coleman he had worked with Ceasarine at another shop. Coleman testified that Ceasarine submitted a resume before he was hired and had been working for contractors on and off in the area for over 5 years. Coleman further testified that electrician Sharpe came to him and asked if he had any work and Coleman hired him. Coleman wasn't sure how many years experience Sharpe had and guessed it may have been 20 years. Respondent failed to present any evidence to show that the three possessed qualifications which were superior to Sylvester's almost 25 years experience as a journeyman. I find that Coleman's testimony that he didn't call Sylvester because he didn't have Sylvester's number is without merit. I conclude it was by Coleman's own purposeful and unlawful acts that caused him not to have Sylvester's number. Coleman specifically admitted that when Dickson had applied for a job on March 12—before Local 363 began distributing handbills at Respondent's jobsites—Dickson was given an application. Indeed, it was the application that allowed him to find Dickson so he could be offered a job. I conclude Sylvester was not given an application to fill out because Coleman had no intention of hiring him because of his honest reply that he was a union member.

To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following: (1) that the Respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the Respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. If the Respondent fails to meet its burden, then a violation of Section 8(a)(3) is established. *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

An employer violates Section 8(a)(3) of the Act even when no hiring is occurring. The Board has long held that hiring need not take place in order to find an unlawful refusal to consider union applicants for employment even if there are no openings when union applicant applies. *Phelps Dodge Corp.*, 313 U.S. 177 (1941).

I conclude based upon the evidence set forth and described above, the General Counsel has established a strong prima facie case, and Respondent has failed to meet its *Wright Line* burden. Accordingly, I conclude Respondent has violated Section 8(a)(1) and (3) of the Act by its refusal to hire Sylvester.

C. Interrogation of Employees

Although there is contradictory testimony between Coleman and Sylvester, as to at what point in the conversation Coleman asked Sylvester, "Are you with the Union?" I find such questioning by Respondent constitutes interrogation and is in clear violation of Section 8(a)(1) of the Act. The Board has long held that questioning concerning union preference in the context of job applications and interviews is inherently coercive and unlawful even when applicants are hired. *Corporate Interiors, Inc.*, 340 NLRB 732 (2003). See *Gilbertson Coal Co.*, 291 NLRB 344 (1988); *M. J. Mechanical Services*, 324 NLRB 812 (1977).

Section 8(a)(1) of the Act proscribes employers from interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. Interference, restraint, and coercion under the Act need not necessarily turn on the motives of the Employer; the test is whether the employer's conduct may reasonably be said to interfere with the free exercise of employee rights under the Act. See *American Freightways Co.*, 124 NLRB 146 (1959).

Dickson credibly testified that on March 21 and 31, Coleman asked him if he was a Union member and both times Dickson avoided answering the question. Dickson's reluctance to tell Coleman that, indeed, he was a member of Local 363, gives evidence to the intimidation and fear Dickson felt. I find that Coleman's conduct constitutes interrogation and is violative of Section 8(a)(1) of the Act.

D. Respondent Summoning Police to Jobsites

The credible testimony of Sager establishes that on May 14, Union Organizer John Sager commenced handbilling at the Marshall's jobsite. In an effort to thwart Sager's efforts to communicate with Respondent's employees, Coleman called the police and filed a complaint that Sager had threatened him. I find it is implausible that, given the construction site setting, Sager's comment that if he had known one of the cars he handbilled was Coleman's he "probably would have shit on it" would strike fear in the heart of Coleman. I do not believe that Coleman was threatened nor do I believe that Sager's statement could be reasonably construed as a threat to damage property. Thus, I find the sole purpose of Coleman's calling the police was to obstruct Sager's organizational campaign.

I find that Coleman continued to use the local law enforcement to keep Sager from communicating with his employees. Coleman admits that on June 19 he received a call from his workers at the New Paltz jobsite informing him that Sager was there. Coleman admits that he "suggested" that the workers at the site call the local police to have Sager removed. I find such that Coleman was engaged in conduct for the purpose of harassing and intimidating Sager, and to discourage employees from talking with the Union.

I conclude, on both occasions Coleman called the police in an effort to harass and intimidate Sager and to discourage employees from talking with the Union. Accordingly, I find such conduct is in violation of Section 8(a)(1) of the Act. *Snyder's of Hanover, Inc.*, 334 NLRB 183 (2001); *Farm Fresh, Inc.*, 326 NLRB 997 (1998); and *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) by interrogating its employees concerning the membership in, and/or their activity on behalf of the Union.

4. Respondent has violated Section 8(a)(1) by summoning the police in order to prevent the Union from engaging in union activities.

5. Respondent has violated Section 8(a)(1) and (3) of the Act by failing and refusing to consider for hire Frank Sylvester because of his union affiliation, or based on a belief or suspicion that he may have engaged in union activity once he was hired.

6. Respondent has violated Section 8(a)(1) and (3) by discharging its employees Mike Browne, because of his membership in, or activity on behalf of the Union.

REMEDY

Having found Respondent has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

With respect to the discharge, of Mike Browne, I shall recommend that he be offered unconditional reinstatement to his former position of employment, or if such position no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights previously enjoyed by him. I shall further recommend that he be made whole for any loss of earnings, or other benefits suffered as a result of his discharge, from the date of such action until the date a valid offer of reinstatement, as defined by the Board is made by Respondent. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed by *New Horizons for the Retarded*, 283 NLRB 1173 (1987). With respect to his discharge on June 2, 2003, Respondent must be ordered to remove from his personnel file any reference to such action, and to notify him that such personnel action will not be used against him in any way.

With respect Respondent's failure to hire, or to consider Frank Sylvester for hire, I shall recommend an order to place Frank Sylvester, in the position he would have been in, absent discrimination, for consideration for future openings in accord with nondiscriminatory criteria, to notify him, the charging party, and the Regional Director of future openings in the position for which he applied, or substantially equivalent positions, and that he be made whole for any losses suffered as a result of Respondent's unlawful conduct, in the manner set forth and described above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, CMC Electrical Construction and Maintenance, Inc., Wallkill, New York, its officers, agents, successors, and assings, shall

1. Cease and desist from

(a) Interrogating its employees, or applicants for hire concerning their membership in or activities on behalf of Local 363, International Brotherhood of Electrical Workers (the Union), or any other labor organization.

(b) Summoning the police, or other law enforcement agencies in order to prevent the Union from engaging in union or protected activities.

(c) Failing, and or refusing to consider applicants for hire because of their affiliation with the Union, or any other labor organization, or based on a belief that such applicant may engage in union activity.

(d) Discharging its employees because of their membership in, or activities on behalf of the Union, or any other labor organization.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order make an unconditional offer of reinstatement to Mike Browne to his former position of employment, or if such position no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights and privileges previously enjoyed.

(b) Within 14 days of this Order, make Browne whole in the manner set forth in the remedy section of this decision, from the date of his initial discharge, on June 2, 2003, until an unconditional offer of reinstatement is made.

(c) Within 14 days of this Order remove from the personal files of Browne, any reference to unlawful discharge, and/or suspension, and notify him in writing that this has been done.

(d) Make whole, job applicant Frank Sylvester for any loss he may have suffered by reason of Respondent's discriminatory refusal to consider him for hire as determined in the compliance stage of this proceeding. Offer to Sylvester, who would be currently employed but for Respondent's unlawful refusal to consider him for hire, the position for which he applied. If such position no longer exists, offer him a substantially equivalent position, without prejudices to his seniority or any other rights or privileges to which he would have been entitled if he had not been discriminated against by Respondent.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its principal place of business located at 336 Birch Road, Wallkill, New York, copies of the attached notice marked "Appendix."[3]

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

Copies of the Notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: April 5, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate our employees, or applicants for hire concerning their membership in or activities on behalf of Local 363, International Brotherhood of Electrical Workers (the Union), or any other labor organization.

WE WILL NOT summon the police, or other law enforcement agencies in order to prevent the Union from engaging in union or protected activities.

WE WILL NOT fail, and or refuse to consider applicants for hire because of their affiliation with the Union, or any other labor organization, or based on a belief that such applicant may engage in union activity.

WE WILL NOT discharge our employees because of their membership in, or activities on behalf of the Union, or any other labor organization.

WE WILL within 14 days of this Order make an unconditional offer of reinstatement to Mike Browne to his former position of employment, or if such position no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL within 14 days of this Order, make Browne whole in the manner set forth in the remedy section of this decision, from the date of his initial discharge, on June 2, 2003, until an unconditional offer of reinstatement is made.

WE WILL within 14 days of this Order remove from the personal files of Browne, any reference to unlawful discharge, and/or suspension, and notify him in writing that this has been done.

WE WILL make whole, job applicant Frank Sylvester for any loss he may have suffered by reason of Respondent's discriminatory refusal to consider him for hire as determined in the compliance stage of this proceeding. Offer to Sylvester, who would be currently employed but for Respondent's unlawful refusal to consider him for hire, the position for which he applied. If such position no longer exists, offer him a substantially equivalent position, without prejudices to his seniority or any other rights or privileges to which he would have been entitled if he had not been discriminated against by Respondent.

WE WILL preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

CMC ELECTRICAL CONSTRUCTION & MAINTENANCE, INC.

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ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."